

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In re Applications of)	MM Docket No. 93-89
)	
AURIO A. MATOS)	File No. BPH-911114MS
)	
LLOYD SANTIAGO-SANTOS and LOURDES)	File No. BPH-911115MP
RODRIGUES-BONET)	
)	
For Construction Permit for a New)	
FM Station on Channel 293A in)	
Culebra, Puerto Rico)	

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FEB - 7 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Review Board

OPPOSITION TO MOTION TO REOPEN THE RECORD AND ENLARGE ISSUES

Aurio A. Matos ("Matos"), by his counsel and pursuant to §§ 1.45 and 1.229 of the Commission's Rules, submits his opposition to the Motion to Reopen the Record and Enlarge the Issue filed by the Mass Media Bureau on January 28, 1994 (the "MMB Petition"). The Petition does not make a prima facie case for the addition of the requested § 1.65 issue and Commission precedent does not support designation of a site availability issue.

I. Background

1. The MMB Petition was filed with the Commission on January 29, 1994 and sought designation of the following issues against Matos:

(a) To determine whether Matos violated Section 1.65 of the Commission's Rules by failing to timely report the loss of his transmitter site, and if so, the effect thereof on his qualifications to be a Commission licensee.

(b) To determine whether Matos has reasonable assurance of the availability of his proposed transmitter site, and if not the effect thereof on his qualifications to be a Commission licensee.

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Matos' proposed site was located on the existing tower of WSAN-FM, Vieques, Puerto Rico. During the hearing process it was brought to Matos' attention that the WSAN tower was located on land under the control of the U.S. Fish and Wildlife Service ("FWS") and that the WSAN tower owner was using the property pursuant to a Special Use Permit issued by the FWS. The FWS represented that it would not decide any questions as to whether or not Matos could also use the site (or for that matter whether they had jurisdiction over what other antennae were placed on the tower, since the tower was the tower owner's private property) until a formal application was before them. ^{1/}

2. After the Presiding Judge issued an Initial Decision ("ID") granting Matos' application, he sent a letter to the FWS in Culebra on December 9, 1993, to determine what their position was with respect to his proposal to place his antenna on WSAN's tower. Shaw Davis, a Project Leader at the FWS office in Boqueron, Puerto Rico, sent a letter to Matos stating that the WSAN tower was an incompatible use with the Wildlife Refuge it was situated upon (the "FWS Letter"). ^{2/} The tower lights were oriented towards the beach and as a result affected the orientation of nesting sea turtles. See MMB Petition Exhibit 1.

^{1/} See Letter from Susan Rice, FWS, dated November 5, 1993, and submitted as Exhibit A of Matos' Reply Exceptions filed December 20, 1993, and attached hereto as Exhibit B.

^{2/} The FWS Letter shows a "cc" to MMB Counsel, which was presumably FWS's intent to notify the FCC of its initial determination or "pre-determination." (see ¶¶ 5-7, infra.)

3. Matos exchanged a copy of this letter with the parties to this proceeding on January 20, 1993, within thirty days of the day it was received by Matos.^{3/} As fully demonstrated in the Petition for Leave to Amend being filed with the FCC on this date, under separate cover (the "Matos Petition"), from the day Matos received the letter, he engaged in discussions with his engineering consultants and legal counsel to determine whether to "fight" the FWS, or "switch" to a new site. Matos elected to "switch", and is amending his application today to specify a new site. The Matos Petition demonstrates that Matos had obtained reasonable assurance from the site owner of the new site by January 4, 1994, and the necessary engineering study was completed by January 11, 1994.

4. The MMB Petition is based on the faulty premise that the FWS Letter was a notice to Matos that he had "lost" his transmitter site, and thus was required to "report" the loss in the form of a Section 1.65 amendment. Further, given that Matos timely exchanged the FWS Letter with the parties to the proceeding, it is folly to accuse him of "intentional concealment" as the MMB does. MMB Petition ¶ 9. Further, case law does not support the addition of an issue to determine whether Matos presently has "reasonable assurance" of an available site. Matos acted diligently in deciding how to proceed after receipt of the preliminary

^{3/} Matos asserts that he did not receive a copy of the FWS Letter until about December 21, 1993. See Declaration of Aurio Matos, attached as Exhibit 2 to his contemporaneously filed Petition for Leave to Amend and attached as Exhibit A hereto for convenience.

determination of a representative of FWS and, upon deciding to "switch" promptly secured a new site.

II. Matos Was Not Obligated To Amend His Application

5. The MMB claims that the FWS Letter "informed Matos of a definite decision not to allow Matos to use his proposed transmitter site." MMB Petition ¶ 4. Instead of a "definite decision", the FWS Letter is the equivalent of a staff letter pre-determination, and "definite decisions" must be made of stronger stuff.

6. The application/appeal procedure at FWS provides that prior to making an adverse decision or order on a permit or application for permit, the refuge manager shall notify the permittee or applicant orally or in writing of the proposed action and its effective date. The permittee or applicant shall have twenty (20) days after notification in which to present to the refuge manager, orally or in writing, a statement in opposition to the proposed action or [effective] date.

50 C.F.R. § 25.45(b) (emphasis added). Twenty (20) days later the refuge manager issues a "final" initial determination. Id. An unsuccessful applicant has thirty days to appeal the decision of the refuge manager to the area manager. 50 C.F.R. § 25.45(c). Decisions of the area manager can be appealed to the regional director. Id. From the regional director, appeals may be taken to the Director of the FWS. 50 C.F.R. § 29.22

7. The Commission does not expect separate notification of "intermediate" correspondence between other agencies and an FCC applicant, although such correspondence may later influence an amendment decision. Radio Lake Geneva Corp., 7 FCC Rcd 5586, 71 RR 2d 758 (¶ 16) (Rev. Bd. 1992) The Commission's reliance is on

"final" determinations. Id.; See also, Kevin Potter, 6 FCC Rcd 7278, 70 RR 2d 496 (¶¶ 10-13) (Rev. Bd. 1992) (Applicant not obliged to report FAA intermediate determinations until it loses "reasonable possibility" due to final FAA determination.) Clearly, the FWS Letter did not have to be reported to the Commission by amendment.

III. The MMB Petition Does Not Raise A Prima Facie Case of § 1.65 Violation

8. The Commission requires that motions to enlarge issues contain "specific allegations of fact" to support the addition of issues and that such allegations must be "supported by affidavits of a person or persons having personal knowledge thereof." 47 C.F.R. § 1.229(d). The MMB alleges that Matos' failure to "report" its receipt of the FWS Letter establishes a prima facie showing of "intentional concealment." The only "evidence" the MMB offers is a copy of the FWS Letter and a copy of a letter from Matos' counsel exchanging the FWS Letter with the parties in as timely a matter as was practicable under the circumstances. ^{4/} MMB does not offer speculation, much less facts or sworn affidavits as to why Matos would "intentionally conceal" a letter from the Presiding Judge or

^{4/} Matos' counsel was called away on an unforeseeable, personal, family emergency on January 7, 1994. He did not return to full time duty until January 18, 1994, and exchanged the document as timely as possible thereafter. See MMB Petition Ex. 2 and the Statement for the Record filed by Counsel on January 28, 1994. Matos should not be held responsible for counsel's delay. See WEBR v. FCC, 420 F2d 2191 (DC Cir. 1969).

the Review Board, while exchanging the same letter with the parties. ^{5/}

9. Matos did not "intentionally" not provide a copy of the FWS Letter to the Review Board. Counsel advised him that since, in his opinion, the FWS Letter did not represent even an initial "final determination" ^{6/}, there was no need to file it as an amendment, only a need to exchange it as a document. ^{7/} Even the case MMB relies upon supports Matos' position. MMB cites GAF Broadcasting, Inc., 8 FCC Rcd 8201 (Rev. Bd. 1993), where a petitioner sought addition of a Section 1.65 issue on the grounds that an applicant failed to "report" that a complaint had been filed against in the Superior Court of New Jersey. The Review Board did not add the issue because pending litigation need not be reported to the Commission; just like intermediate correspondence with other agencies, we submit. Further, the Review Board found that a prima facie case had not been demonstrated because neither

^{5/} Assuming, arguendo, the Review Board finds Matos should have reported the letter, this would be his first such violation. The MMB Petition calls Matos' basic qualifications to be a licensee into question in the § 1.65 issue as requested, but case law holds that absent a pattern of reporting violations, applicants are not dismissed for Section 1.65 infractions. See, Ithaca TV Associates, 101 FCC 2d 709, 58 RR 2d 1068 (¶ 11) (Rev. Bd. 1985), citing, Valley FM Radio, 99 FCC 2d 924, 57 RR 2d 420 (Rev. Bd. 1984); George E. Cameron, Jr. Communications, 91 FCC 2d 870, 872-884, 52 RR2d 455 (Rev. Bd. 1982).

^{6/} See, ¶¶ 5-7, infra.

^{7/} Consistent with Radio Lake, supra, Matos intended to make, and has made the FWS Letter a part of the Matos Petition, as a means of demonstrating the diligence he has undertaken in deciding to acquire, then acquiring, a new site.

decisional significance, intent to deliberately conceal, nor a pattern of reporting violations had been shown. GAF at ¶ 4.

10. The purpose of Section 1.65 is to contribute to "administrative fairness in comparative cases by keeping applicants informed about the true nature of their competition through the comparative hearing." Bay Television, Inc., 95 FCC 2d 181, 183 (Rev. Bd. 1983) Without question, Matos has met that obligation, having provided copies of the FWS Letter to the other parties to this proceeding as promptly as counsel was able to.^{8/} The facts of this case simply do not warrant addition of a reporting issue. See, Ithaca TV Associates, 99 FCC 2d 924, 58 RR 2d 1068 (Rev. Bd. 1985) (failure to report state park authority denial of construction request, while serious, did not warrant addition of reporting issue, because there was no "pattern" of violations, and the delay was further mitigated because the parties were simultaneously engaging in settlement discussions).^{9/} The MMB Petition does not allege that Matos is guilty of repeated reporting violations and its allegation that the information contained in the FWS Letter is of "decisional significance" is based on the faulty premise that the letter was a final determination of the FWS.

^{8/} As the MMB concedes, it was aware of the FWS Letter as early as December 22, 1993, and Matos' counsel informally advised counsel for Santiago and Rodrigues on January 18 of the existence of the letter.

^{9/} Compare, Valley FM Radio, supra, (applicant's failure to, after several opportunities over many months, disclose two letters from the site owner flatly denying its request to use its proposed site, demonstrated a pattern of repeated violations of the FCC's reporting requirements, warranting dismissal of its application.)

Designation of the requested reporting/qualifications issue against Matos is against Commission precedent and policy, and not supported by the facts.

IV. The Requested Site Availability Issue Should Not Be Added

11. As demonstrated more fully in the Matos Petition and Exhibit A hereto, upon receipt of the FWS Letter, Matos was faced with the same decision as the applicant in Lake Geneva, supra. The agency that the applicant needed permission from (in Lake Geneva, the FAA, with Matos, the FWS) issues a preliminary or initial determination that it will not grant its consent to the applicant's proposed site. Both applicants conclude that the initial determination does not have to be reported to the Commission, but the Lake Geneva applicant decides to "fight" the FAA, while Matos decides to "switch", because he is seeking an expeditious resolution of this proceeding. ^{10/} He secured his new site and had the engineering prepared by his consultant by January 11, 1994. ^{11/}

12. The facts supporting these statements are more fully explained in the Matos Petition. Even the MMB Petition concedes

^{10/} In fact, there was a settlement agreement in principle between the parties that was reported to the Commission and the MMB on January 19, 1994. The MMB Petition has caused some retrenching, but the parties believe the proposed settlement, which called for Matos to be the surviving applicant, can still be achieved.

^{11/} The delay in filing the amendment is attributable partly because of counsel's one week absence, part because of counsel's distraction with settlement negotiations and documentation and partly because of the need to respond to the MMB Petition. Those delays should not be attributed to Matos in any "good cause" evaluation. Marin TV, supra.

that, assuming the FWS Letter represents a loss of reasonable assurance, Matos has been without reasonable assurance of the availability of his transmitter site only since his receipt of the FWS letter on or about December 21, 1993. MMB Petition ¶ 6; Matos Declaration, Ex. A, ¶ 3. Now, on February 7, 1994, he is responding to receipt of the FWS Letter with an amendment. Certainly the timeliness is within the realm of acceptability. Compare, Shoblom Broadcasting, Inc., 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983) (applicant waits 20 months after receipt of letter from National Park Service denying permission to construct before amending.) Matos submits that he has demonstrated "good cause" in the Matos Petition and that grant of the Matos Petition by the Review Board will moot the MMB's concern over Matos' site availability. ^{12/}

V. Conclusion

13. Neither of the requested issues should be added. Addition of a reporting issue is not warranted because the document in question was not a "final" determination of Matos' inability to use the FWS site where WSAN-FM is currently located. Aside from due process considerations, there are several levels of intra-agency appeals Matos could have pursued and plenty of room for mitigation of the problems. In light of the fact Matos timely exchanged the FWS Letter with the other parties to this proceeding

^{12/} Again, the MMB seeks to drag Matos' basic qualifications to be a Commission licensee into a simple current site availability issue. Matos basic qualifications should not be subject to examination without substantiated allegations of lack of candor or willful misconduct, which the MMB Petition does not offer.

it is clear Matos is not guilty of "intentional concealment." Not even the MMB can posit a theory as to why Matos would order counsel to deliver that letter to everyone involved except the Review Board.

14. Matos has demonstrated "good cause" for his proposed amendment. By January 11, 1994, he had decided to switch sites rather than carry on a protracted fight with FWS, reasoning a "switch" was a guarantee, where a "fight" could go either way. Matos looked for potential sites, settled on one that would provide similar coverage, and secured the consent of the site owner. Then Matos provided his engineers with the identification of the site and commissioned a new engineering study. All of this was accomplished less than 30 days from the date Matos received the FWS Letter.

WHEREFORE, it is respectfully requested that the Mass Media Bureau's Motion to Reopen the Record and Enlarge the Issues be denied in all respects and the Contingent Document Request be dismissed as moot.

BROWN, NIETERT & KAUFMAN
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
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Respectfully submitted,
AURIO A. MATOS



Scott C. Cinnamon
His Attorney

February 7, 1994

EXHIBIT A

DECLARATION

I, Aurio Matos, under penalty of perjury and pursuant to Section 1.16 of the Commission's Rules, do hereby declare:

1. I am an applicant for a new FM Station at Culebra, Puerto Rico, and was involved in a comparative hearing with a competing applicant, Lloyd Santiago-Santos and Lourdes Rodrigues-Bonet. On November 4, 1993, the Judge issued an Initial Decision granting my application because I had proposed a site that served more people in a larger area and had more broadcast experience.

2. The site where I proposed to locate my tower is the same site currently used by WSAN-FM. Before I filed my application, I spoke with the owner of the tower, Sr. Carlos J. Colon-Ventura, and he gave me permission to use his tower to place my antenna. I found out later, when Santiago and Rodrigues filed a petition against me on June 22, 1993, that Colon-Ventura's tower is located on the property of the U.S. Fish and Wildlife Service ("FWS"). I hired a lawyer in Puerto Rico to speak with the FWS at Culebra, and he was told that they would not make a decision on whether or not they wanted me to locate my antenna with Colon-Ventura's until after I was granted the construction permit from the FCC.

3. On December 9, 1993, after the Judge granted my application, I made a request to FWS for permission to put my antenna on Colon-Ventura's tower. I received on December 21, 1993, a letter from FWS dated December 13, 1993, saying that they did not want to grant me permission to place my antenna on Colon-Ventura's tower.

4. During the next week and a half, I had many conversations with my attorney, Scott Cinnamon and my engineering consultants at Bromo Communications. They advised me, and eventually I agreed, that instead of appealing the FWS letter, I should find a new site.

5. By December 28, 1993, I had located a potential new site and contacted the site owner, Sr. Jose R. Perez-Villamil by telephone. After I had his initial approval, I scheduled a meeting with him to further discuss the project. We met on January 3, 1994, and he agreed on that day to provide a letter to the FCC saying that he would allow me to locate a tower and transmitter for my FM station on his property pursuant to a lease. That same day I faxed the coordinates of Sr. Perez-Villamil's property to my engineers so that they could prepare the necessary engineering amendment.

6. I realized that at the Perez-Villamil site, instead of an existing tower, I would now have to construct my own tower. I have in my possession a self-supporting tower that can be used for the Culebra station. During the next week, my engineers told me that it would add between \$5,000 and \$10,000 to the budget amount I had proposed to construct and put up the tower.

7. The engineers told me they had sent the engineering portion to my attorney to be filed on January 11, 1994. I called my attorney's office and they told me of the unfortunate personal circumstances that kept my attorney away from Washington for the week of January 10 to January 14, 1994.

8. While the engineers were working on the engineering amendment, I had many discussions with my attorney and he suggested some strategies at how I might be able to settle the case, and explained to me about a court decision that might delay any actions in comparative hearing cases like mine for several years. I decided to contact the other party to see if they were interested in settling, and they were. When my attorney returned, he and I worked on getting an agreement together where the case would be settled and the parties reached an agreement in principle on January 18, 1994.

9. On January 19, 1994, the lawyers for the two parties filed a letter with the Review Board at the FCC telling them the parties had reached an agreement and asking that all actions be stopped while a formal agreement was prepared and filed. Since then I have been speaking with Santiago and Rodriguez and the lawyers have been working on preparing settlement documents for us to sign. There was some discussion between the parties over whether my amendment should be filed before or after settlement and that has held up the process. I have been informed, and reviewed a copy of the petition filed by the Mass Media Bureau on January 28, 1994. It was never my intent to withhold any evidence from anybody. The Mass Media Bureau lawyer received the FWS letter at the same time I did. My attorney told me that we would have to turn that letter over to the parties and I told him if that's what we should do, then let's do it. I believe still that I could locate my antenna at the WSAN tower if I wanted to, by appealing the FWS letter and arguing that the tower actually belongs to Colon-Ventura so FWS should not be able to stop us. This is based on discussions I had with my attorneys in Washington and Puerto Rico. To more quickly move the case along, and to avoid the FWS appeal process, I decided to find a new site instead.

Aurio A. Matos

Date:



United States Department of the Interior

FISH AND WILDLIFE SERVICE
 Caribbean Islands National Wildlife Refuge
 P.O. Box 510, Crr. 301, Km. 5.1
 Boqueron, Puerto Rico 00682

November 5, 1993

Bonny Frankie Cerazo, Esq.
 Hostos 84B
 Hyde Park
 Rio Piedras, PR 00927-4219

Dear Lcdo. Cerazo:

I am writing in response to your request for clarification of my letter, dated July 16, 1993, to Audray P. Rasmussen, Esq., of O'Connor & Hannan. In my letter to Ms. Rasmussen I explained the authority that Mr. José O. Colón has over the land and antenna at the Monte Rosado unit of the Culebra National Wildlife Refuge, but did not discuss in that letter whether the Fish and Wildlife Service (FWS) would or would not issue a Special Use Permit to your client.

I have been informed, however, that it may be the intention of a third party to a pending Federal Communications Commission FM comparative proceeding to rely on that letter to convey the impression that FWS has decided not to issue a Special Use Permit to your client for co-location on the tower that is on refuge property. Although FWS is attempting to reduce the use of this radio antenna, a determination has not yet been made on the final outcome of the use of this antenna.

Please be aware that anyone may file a request for issuance of a Special Use Permit. It is not the policy of FWS to issue determinations on the merits of any request for a Special Use Permit before we have a request in hand. If your client receives a license from the FCC to operate an FM station on the island of Culebra he may then request a Special Use Permit. We would make a determination on issuance of a Special Use Permit at that time.

Sincerely,

Susan M. Rice
 Susan M. Rice
 Refuge Manager

CERTIFICATE OF SERVICE

I, Phyllis Lee, do certify that on this 7th day of February, 1994, a copy of the foregoing was sent via first class mail, postage prepaid or delivered, as indicated, to the parties set forth below:

Honorable Joseph A. Marino, Chairman
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Federal Communications Commission
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Washington, D.C. 20554 *

Honorable Norman B. Blumenthal
The Review Board
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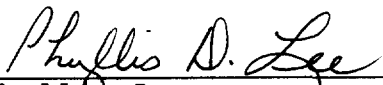
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* - via hand delivery


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